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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

CESAR YOVANI CISNEROS, JR.,

Defendant and Appellant.

E055692

(Super.Ct.No. INF10000283)

OPINION

APPEAL from the Superior Court of Riverside County. W. Charles Morgan, Judge. (Retired judge of the Riverside Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed as modified.

Allen G. Weinberg, under appointment by the Court of Appeal for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and Lynne G. McGinnis and Kristine A. Gutierrez, Deputy Attorneys General, for Plaintiff and Respondent.

Following a jury trial, defendant Cesar Yovani Cisneros, Jr., was convicted of attempted premeditated murder (Pen. Code,¹ §§ 664, 187, subd. (a); count 1), assault with a firearm (§ 245, subd. (a)(2); count 2), and unlawful carrying of a loaded firearm (former § 12031, subd. (a)(1); count 3). The jury further found true the allegations that defendant personally and intentionally discharged a firearm in counts 1 and 2 (former § 12022.53, subd. (c)), and he inflicted great bodily injury in count 2 (former § 12022.7, subd. (a)). On February 17, 2012, the trial court sentenced defendant to prison for a term of life with the possibility of parole for count 1, plus a consecutive term of 20 years for count 2. He appeals, contending the trial court erred when it failed to grant his motion for new trial based on ineffective assistance of counsel. He further contends his sentence on the personal discharge of a firearm enhancement (former § 12022.53, subd. (c)) in count 2 should have been stricken, not stayed.

I. FACTS

A. The Prosecution's Case

Shortly after 3:00 p.m. on January 5, 2010, Jonathan Disario was giving his coworker, Rosendo Flores, a ride home in a white 1992 Cadillac. Disario stopped behind a blue Lincoln at a stoplight on Ramon Road. Defendant got out of the Lincoln, approached the Cadillac, and fired six to eight shots at Disario and Flores. Disario received gunshot wounds to his left forearm, left elbow, and left triceps. Flores was shot

¹ All further statutory references are to the Penal Code unless otherwise indicated.

in the left leg. Defendant then fled in his vehicle down Kirk Douglas Way. Eyewitnesses called 911.

Neither victim identified defendant as the shooter. However, an eyewitness to the shooting, Marine Corps Master Sergeant Kelly Crawford, identified defendant as the shooter in a photographic lineup and in court.²

Disario's and Flores's hands tested positive for gunshot residue. However, the residue could have been from the shots fired into their car. If a shooter stood outside of a car within 14 feet and fired into it, gunshot residue would likely enter the car and explain the presence of such residue on the victims' hands. The time at which the victims got gunshot residue on their hands could not be pinpointed.

During the course of the investigation, the detectives discovered the suspect car was registered to defendant's mother. Defendant, who matched the description of the shooter, was a frequent driver of the vehicle and had been stopped while driving it on several occasions. When the Lincoln was searched a few weeks after the shooting, a strip of photographs of a woman and an individual in a photo booth who matched the description of the shooter, whom the detective believed was defendant, was found in the trunk of the car. Defendant's finger and palm prints were found on the exterior of the front and rear driver's side windows.

² Crawford's testimony was taken prior to trial before Judge James Hawkins and a recording of the testimony was played for the jury.

B. The Defense

Officer Michael Casavan testified that on the day the Lincoln was located, a red Jeep drove by while the officers were waiting for the tow truck. When Officer Casavan stopped the Jeep, he saw that the passenger had an open one-gallon milk container containing gasoline with a wick sticking out of the opening. He had gloves in his lap. The two individuals in the red Jeep were identified as Ruben Corona and Juan Morales. When the officers searched the Jeep, they also found a lighter and a key to the Lincoln.

Defendant's good friend, Gabino Torres, testified that he and his ex-girlfriend, Cynthia Gonzales, were the individuals in the photo booth pictures. He testified that he did not know where he had left the photographs.

II. MOTION FOR NEW TRIAL

Following defendant's conviction, he hired different counsel to file a motion for new trial based on ineffective assistance of counsel. The motion alleged that trial counsel had made a decision to defend the case based on identity when a competent lawyer who had investigated the case would have determined defendant had a better chance of a successful outcome if the defense had conceded that defendant was the shooter but that he acted in perfect or imperfect self-defense. Following extensive evidentiary hearings, the trial court denied the motion, stating: "[Y]ou don't have to be the best person—trial counsel in the world. You just have to avoid being one of the worst, so that spectrum, I think, has been met, that he was a reasonably competent attorney handling it in his

position, so I'm going to deny the request of the motion for new trial." Defendant claims the trial court abused its discretion in denying the motion.

A. Background/motion for New Trial

At trial, defense counsel presented a defense of mistaken identity and third-party culpability. This defense was supported by the following evidence: Neither victim identified defendant as the shooter. Disario said that he could not identify the shooter and that the shooter was not the person who usually drove the Lincoln (who defense counsel argued was defendant). Flores testified at trial that he saw the shooter only from the chest to the stomach and did not pay attention to the shooter's appearance. Flores also told Detective Long he could not identify the shooter. When Flores was shown a photographic lineup with defendant's picture, he did not identify defendant as the shooter. Rather, Flores appeared upset when he was shown a photographic lineup that included a photograph of Ruben Corona, who had the key to the Lincoln in his possession when he was arrested two days after the shooting.

Two eyewitnesses were shown the photographic lineup with defendant's picture and indicated someone other than defendant appeared similar in appearance to the shooter. One witness said the shooter had a goatee. Eyewitness identifications of the shooter were inconsistent. Many other eyewitnesses were unable to identify the shooter. According to Officer Casavan, Ruben Corona was arrested after driving by the Lincoln and he was in possession of keys to the Lincoln. Gabino Torres testified that he was the male who was pictured in the pictures found in the trunk of the Lincoln.

Based on the above, defense counsel argued that Ruben Corona, not defendant, was most likely the shooter. He claimed that law enforcement erred in focusing on defendant, because the officers failed to fully investigate the case and show witnesses Corona's picture. He challenged Sergeant Crawford's identification of defendant on the grounds it was unreliable because Crawford had not seen defendant prior to the shooting, was under stress, provided only a generic description of the shooter at the time of the shooting, and the photographic lineup was questionable because there were only two men with mustaches and one was not Hispanic.

Following the jury's verdict, defendant argued he deserved a new trial because his counsel was ineffective. While the motion for new trial listed several instances of ineffective assistance, defendant has limited this appeal to two, namely, counsel's failure to interview witnesses, and counsel's failure to investigate evidence of self-defense. Thus, our discussion of the hearing is limited to evidence relevant to these two instances.

Defendant argued that the evidence supported a claim of self-defense because Disario was a violent gang member who was known to carry a gun and who had prior confrontations with defendant and others. Defendant provided the dates of those prior confrontations. He claimed that he moved twice to escape the harassment, but a few weeks before the shooting, Disario followed him in his Cadillac and defendant heard through friends that Disario had said he was going to "spray [defendant's] car with bullets." Defendant claimed Disario was following him on the day of the shooting and that he (defendant) believed Disario had a gun. Thus, defendant got out of his car and

shot Disario because he feared for his life and the life of his fiancée. According to defendant, his family and friends would have testified about the confrontations between him and Disario, along with his fear of Disario. Defendant faulted his trial counsel for not investigating and presenting evidence of his nonviolent character. Finally, defendant noted that Disario admitted previously carrying a gun and following defendant.

Defendant offered police reports, the declaration of an experienced trial attorney, the declaration of a defense investigator and gang expert, and letters from character witnesses in support of his motion for new trial based on ineffective assistance of counsel. Upon receiving use immunity, defendant submitted a declaration. In opposition, the prosecution argued that defendant failed to establish prejudice resulting from defense counsel's alleged errors.

A hearing began on December 12, 2011. Defendant's trial counsel, Kenneth Gregory, testified that he was retained by defendant's mother. His partner, Joseph Rhea, first met with defendant. Gregory knew that self-defense was a potential defense, and he discussed with defendant his prior confrontations with Disario. Gregory researched this possible defense, including Evidence Code and jury instructions, and he conducted a factual investigation. While he did not use an investigator to contact witnesses, Gregory had 17 years of experience in law enforcement prior to becoming an attorney. He interviewed defendant's sister and sister-in-law about defendant's history with Disario. He spoke to defendant's mother about his problems with Disario, but she never said that defendant was afraid of Disario.

The version of the shooting given by defendant's fiancée, Margarita Guzman, differed from that of defendant. Guzman provided Gregory with a list of family members who she said had witnessed the shooting. Upon further questioning, she admitted they were not witnesses to the instant shooting but would testify to anything the defense wanted them to say. Gregory did not question any of the witnesses about the instant shooting because he "[doesn't] waste [his] resources following or tracking down perjured testimony."

Regarding defendant's history with Disario, Gregory stated that defendant's explanation of his confrontations with Disario (including the instant one) was inconsistent with what was contained in police reports. For example, defendant initially accused Disario of beating him with a baseball bat in February 2007, but recanted when confronted with the police reports showing that it was another individual. Defendant never said he was afraid of Disario; rather, "his expression was consistently we take care of our own business." Gregory was also aware of Disario's criminal history and discussed it with defendant. He spoke with the prosecutor about one of Disario's cases and considered the admissibility of evidence of his criminal history and his gang membership. Following further research regarding self-defense related issues, Gregory spoke with defendant and they decided not to conduct further investigation into the prior incidents. Gregory was aware that defendant had no prior convictions or violent history other than the altercation in February 2007.

Gregory agreed there were facts that would have supported an argument for self-defense; however, he believed defendant would need to testify for this to be viable defense. Gregory did not believe defendant would “survive cross-examination,” because defendant had changed his story throughout his interviews, and he came across as tough and not afraid. Thus, Gregory had serious questions as to how defendant would look to a jury and whether the defense would have problems “selling self-defense” to the jury. For example, defendant changed his story as to whether Disario or Disario and Flores were shooting at him, the location where the altercation began, the route of travel, and whether Disario was following him or whether defendant just looked in his rearview mirror and saw Disario. Moreover, counsel was concerned that if the jury heard about defendant and Disario’s prior history, it may conclude defendant acted with premeditation and deliberation, and not self-defense. Nonetheless, counsel told defendant he had the absolute right to testify on his own behalf.

After great discussion with defendant, Gregory made a tactical decision that it was better to go with a defense of mistaken identification and third-party culpability rather than self-defense. Defendant agreed. Gregory did not speak with family members regarding possible testimony as character witnesses because he already knew how they would testify and because he had already decided self-defense was not a viable defense.

According to defendant’s co-counsel for his motion for new trial, defendant’s files from Gregory did not contain any notes from meetings with defendant other than brief “case notes” from court appearances. There were no notes from interviews with

witnesses other than defendant's sister and sister-in-law. Defendant's mother testified that she spoke with Gregory about the financial aspect of her son's defense, but Gregory would not discuss the case with her. She used defendant's fiancée to translate for her, not counsel's paralegal as he claimed.

Defendant's fiancée testified that she provided trial counsel with a list of names and phone numbers of witnesses to the incidents between defendant and Disario. She denied saying they would say whatever defendant wanted them to say. She told counsel that she was present during the shooting but never called 911 or spoke with police. She did not see or hear any shots fired before defendant got out of the car. She stated that she reviewed her declaration, it was accurate, and that she had talked with defendant about the case.

Defendant testified and admitted that he shot Disario because he was in fear for his life and that of his fiancée. He spoke with Gregory's partner and admitted shooting Disario but explained that he did so because he believed Disario was chasing him and had been shooting at him. Gregory's partner opined that defendant had a self-defense case. Gregory met defendant at the jail but did not ask him any questions about what had happened. Instead, Gregory said that self-defense would not work. Prior to the preliminary hearing, Gregory told defendant that it was either going to be a self-defense or identification case. When defendant said he believed it was self-defense, Gregory said he believed identification would work better. Gregory expressed concern that the jury would not like defendant; he had not filed any reports of Disario attacking him, and there

was no evidence of any gunshots fired at his car. Although Gregory told defendant it was his choice as to which defense to pursue, defendant did not believe he really had a choice.

Defendant testified that he was living in fear of Disario, who had assaulted and threatened him in the past. He described prior incidents involving Disario. He testified that Disario began “chasing” him on the day of the shooting. When he looked in his rearview mirror, he saw something sticking out of the driver’s side window and believed it was a gun. He heard several “pops,” which caused him to panic. He told his fiancée to duck down, and then he heard two more “pops.” He sped off but got stuck at the red light with Disario behind him. Fearing Disario would shoot him, defendant grabbed his gun, jumped out of the car, and opened fire on Disario.

Taylor Huff, an experienced attorney, offered expert testimony regarding the standards and obligations in defending criminal defendants. He opined that Gregory’s handling of the case, especially with regard to his failure to investigate, fell well below the standard to be expected of the average competent criminal defense lawyer.

At the end of the hearing, defense counsel argued that Gregory’s representation was ineffective because he made up his mind about the viability of self-defense prior to conducting a proper investigation. The prosecutor argued that trial counsel was competent in his choice of a defense because a claim of self-defense was not credible. The trial court agreed with the prosecutor and denied defendant’s motion for new trial.

B. Standard of Review

“[I]neffective assistance of counsel is not among the nine grounds for ordering a new trial set forth in Penal Code section 1181, but our Supreme Court has made clear that ‘the statute should not be read to limit the constitutional duty of trial courts to ensure that defendants be accorded due process of law,’ and that in appropriate circumstances ‘the issue of counsel’s effectiveness [may be presented] to the trial court as the basis of a motion for new trial.’ [Citation.]” (*In re Edward S.* (2009) 173 Cal.App.4th 387, 398, fn. 3.)

“The standard for establishing ineffective assistance of counsel is well settled. A defendant must demonstrate that: (1) his attorney’s performance fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been more favorable to the defendant. [Citation.] A reasonable probability is a probability sufficient to undermine confidence in the outcome. [Citation.]” (*People v. Stanley* (2006) 39 Cal.4th 913, 954.)

“In determining whether counsel’s performance was deficient, a court must in general exercise deferential scrutiny,” and “view and assess the reasonableness of counsel’s acts or omissions . . . under the circumstances as they stood at the time” (*People v. Ledesma* (1987) 43 Cal.3d 171, 216.) “Although deference is not abdication [citation], courts should not second-guess reasonable, if difficult, tactical decisions in the harsh light of hindsight. [Citation.]” (*People v. Scott* (1997) 15 Cal.4th 1188, 1212.)

C. Analysis

According to defendant, Gregory was ineffective because (1) there were no handwritten notes in his file; (2) he failed to employ an investigator; (3) he failed to personally investigate the past history of incidents between defendant and Disario; (4) he failed to interview the 15 listed eyewitnesses to the shooting; and (5) he failed to research the law and investigate the facts to support a claim of perfect or imperfect self-defense. After considering the record before this court, we conclude defendant failed to show that Gregory's performance was deficient under the circumstances.

To begin with, the fact that Gregory did not have many handwritten notes in his file is irrelevant. Lawyers work and prepare their cases differently. Some use extensive notes; others do not. We decline to hold that unless a lawyer's file is flooded with a pad of handwritten notes, the lawyer's performance was deficient. On a similar note, the failure to employ an investigator is an individual preference. Here, Gregory's background included 17 years of experience in law enforcement prior to becoming an attorney. Given his past experience, an investigator could not have offered any service that he could not provide. Further, once a decision was made to pursue a theory of mistaken identity, the need for an investigator diminished.

Next, in deciding whether to pursue a claim of mistaken identity over a claim of self-defense, Gregory began with a review of the facts surrounding the January 5, 2010, incident. An investigation into the past history between defendant and Disario was necessary only if the defense was limited to a claim of self-defense. As for the 15

eyewitnesses, they were not eyewitnesses to the January incident, as defendant's sister initially alleged. Rather, the list contained the names of people who were character witnesses or witnesses who would testify about the history between defendant and Disario. Like an investigation of the past history between defendant and Disario, there was no need for Gregory to interview any of those witnesses unless a decision to pursue self-defense was made. Even then, defendant's sister had told Gregory those witnesses would say whatever the defense wanted them to say. Given this statement, Gregory could not trust what those witnesses would say. Thus, he may not be faulted for refusing to pursue possibly perjured testimony. Nonetheless, defendant relies on *People v. Bess* (1984) 153 Cal.App.3d 1053, 1060 [concluding counsel's failure to interview witnesses who supported defendant's innocence was unreasonable]. However, when a defendant alleges incompetent investigation or presentation of evidence by trial counsel, he or she must show that the overlooked evidence would have been exculpatory in some fashion. (*In re Noday* (1981) 125 Cal.App.3d 507, 522.) The defendant must show us "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Strickland v. Washington* (1984) 466 U.S. 668, 693-694.) More importantly, defendant must establish that trial counsel's actions were not based on a strategic decision. (*In re Thomas* (2006) 37 Cal.4th 1249, 1264, fn. 4.)

Regarding defendant's claim that Gregory failed to research the law and investigate the facts to support a claim of perfect or imperfect self-defense, the record shows otherwise. Gregory did research the law. As to interviewing the witnesses to the

January incident, Gregory was in possession of the police reports, which summarized the witnesses' statements. As Gregory correctly deduced, the witnesses' identifications of the shooter were questionable. A decision not to waste time and resources interviewing these witnesses was reasonable. As the People point out, by interviewing these witnesses, Gregory faced the risk that they might say something harmful to the defense. However, as their statements stood, they were inconsistent in identification and thus, more harmful to the prosecution.

Regarding third party culpability, defendant cites *People v. Hall* (1986) 41 Cal.3d 826, 833, where our state's highest court addressed the rules governing admissibility of evidence of third-party culpability. "To be admissible, the third-party evidence need not show 'substantial proof of a probability' that the third person committed the act; it need only be capable of raising a reasonable doubt of defendant's guilt. At the same time, we do not require that any evidence, however remote, must be admitted to show a third party's possible culpability. As this court observed in *Mendez*, evidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant's guilt: there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime." (*Ibid.*) Here, defendant contends Gregory failed to utilize the evidence in his possession, which would support the theory that Ruben Corona was the one who shot Disario on January 5, 2010. However, Gregory's decision to keep things vague was sound. If Corona had an alibi for

the shooting on January 5, then pointing the finger at him would have backfired.

Keeping it vague was reasonable and logical.

According to the record before this court, before Gregory acted, he made a rational and informed decision on strategy and tactics based on adequate investigation and preparation. (*People v. Ledesma, supra*, 43 Cal.3d at p. 215.) Other than defendant's self-serving claim that Disario was chasing and shooting at him on January 5, 2010, there was no evidence that such was the case. Given the history between these two individuals, the risk that the jury would have found premeditation and deliberation on defendant's part was great. According to Gregory, defendant never filed any reports with the police claiming that he was being followed or harassed by Disario. During interviews, defendant never conveyed that he was afraid of Disario. In contrast, there was strong evidence to call into question the witnesses' identification of defendant as the shooter. The decision to pursue misidentification over self-defense was reasonable and logical. The fact that it may not have resulted in a verdict in favor of defendant does not mean the pursuit of a different defense would have. Accordingly, defendant has failed to establish that he was deprived of his right to effective assistance of counsel.

III. FORMER SECTION 12022.53 FIREARM ENHANCEMENT

Defendant contends, and the People agree, that the former section 12022.53 firearm enhancement in count 2 should have been stricken instead of stayed.

Defendant was convicted in count 2 of violating section 245, subdivision (a)(2). The jury found true the allegation that he personally and intentionally discharged a

firearm in violation of former section 12022.53, subdivision (c), during the commission of count 2. According to the abstract of judgment, the former section 12022.53 enhancement attached to count 2 was stayed; however, such enhancement applies only to the offenses listed in subdivision (a) of that section (former section 12022.53), and a section 245, subdivision (a), offense is not included. Because the enhancement could not lawfully be imposed, we will order it stricken instead of being stayed. (*People v. Smith* (2001) 24 Cal.4th 849, 852 [an unauthorized sentence may be corrected on appeal].)

IV. DISPOSITION

Defendant's firearm use enhancement (former section 12022.53, subdivision (c)) attached to count 2 is hereby stricken. The trial court shall prepare a new abstract of judgment to reflect this modification and forward a copy to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.

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HOLLENHORST

J.

We concur:

RAMIREZ

P.J.

KING

J.